Supreme Court of the United States

October Term, 1976

No. .....

76-1345

SOVEREIGN NEWS COMPANY,
Petitioner,

vs.

THE UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit

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PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in this cause. The judgment of the Court of Appeals dismissed petitioner's appeals from the judgments of the United States District Court for the Northern District of Ohio, Eastern Division, which denied petitioner's complaints presented under Rule 41(e) of the Federal Rules of Criminal Procedure for return of its seized property.

OPINION BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit is reported in 544 F.2d 909 (6th Cir. 1976), and is printed in the Appendix, *infra*, p. 16.

JURISDICTION

The opinion of the Court of Appeals dismissing petitioner's appeals from the judgments of the District Court was filed on November 17, 1976. Appendix, *infra*, p. 16. Thereafter, petitioner's petition for rehearing and suggestion for *en banc* consideration was denied by the Court of Appeals and an order was entered thereon on January 4, 1977. Appendix, *infra*, p. 15.

The action arose under complaints filed by petitioner in the United States District Court, pursuant to Rule 41(e) of the Federal Rules of Criminal Procedure, in which petitioner sought return of its property which it alleged had been unlawfully seized under invalid search warrants. The District Court dismissed the complaints and petitioner perfected timely appeals to the Court of Appeals, which dismissed the appeals.

This Court has jurisdiction to grant this petition under United States Code, Title 28, Section 1254(1), which provides for review by writ of certiorari of any case in the courts of appeals.

QUESTION PRESENTED

Where no criminal prosecution is *in esse* against the movant at the time of a ruling denying a motion solely for return of property filed pursuant to Rule 41(e) of the Federal Rules of Criminal Procedure, and where an appeal is perfected from such denial of the motion for return by the timely filing of notice of appeal and briefs, and where an indictment predicated upon the seized materials is thereafter returned against the movant, does such post-decision indictment serve to divest the Court of Appeals of jurisdiction to determine the appeal?

STATUTE INVOLVED

The statute involved is Title 28 U.S.C. §1291, which provides:

"Final decisions of district courts.

> The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court."

STATEMENT OF THE CASE

On July 17, 1975, petitioner filed two separate complaints in the United States District Court for the Northern District of Ohio which were in the form of motions presented under Fed. R. Crim. P. 41(e), solely for return of petitioner's property. Petitioner alleged that its property had been unlawfully and unconstitutionally seized by federal agents in the course of execution of two warrants issued by a magistrate authorizing the search of petitioner's premises in Cleveland, Ohio on March 19, 1975 and on March 25, 1975. On October 15, 1975, after an evidentiary hearing, the District Court denied petitioner the relief it sought as to both complaints. Petitioner filed its notices of appeal to the United States Court of Appeals for the Sixth Circuit on October 16, 1975. Neither at the time petitioner filed the original complaints in the District Court, nor at the time of the denial of the complaints, was there a complaint, order of detention or release, arraignment, information or indictment issued against petitioner.

On March 25, 1976, after briefs of petitioner and respondent had been filed in the Court of Appeals and at a time when the appeals were pending in the court below, an indictment, which was based on the materials that had been seized a year prior thereto and which were the subject of the Rule 41(e) motions, was returned in the District Court for the Northern District of Ohio against petitioner and others, charging violations of Title 18 U.S.C. §§1461, 1462, 1465, 371 and 2. On April 23, 1976, respondent, relying on the indictment, moved the court below to dismiss the appeals upon the ground that the judgments appealed from were no longer final appealable orders. The motion was denied July 15, 1976. Appendix, *infra*, p. 19.

The appeals were thereafter argued on their merits to the court below, which, on November 17, 1976, determined that it had improvidently denied respondent's motion to dismiss, and thereupon granted the motion and dismissed the appeals. Appendix, *infra*, p. 16. Petitioner's petition for rehearing was denied. Appendix, *infra*, p. 15.

REASONS FOR GRANTING THE WRIT

This case presents an important issue pertaining to the effect which a post-decision indictment has on a pending appeal from an order denying a Rule 41(e) motion for return of property. The court below found that the post-decision indictment served to divest the appellate court of jurisdiction. Petitioner contends that such determination is not consistent with the decision of this Court in *DiBella v. United States*, 369 U.S. 121 (1962), for which reason review by certiorari should be granted.

In addition, this case presents an opportunity for this Court to give consideration to the factors which militate in favor of permitting review of a pre-indictment motion decision as a means of subserving judicial economy for both the appellate and district courts, while at the same time according the unindicted movant an opportunity to seek appellate review without risk of indictment by reason of its having pursued an appeal from the denial of its motion.

I. The Judgment of Dismissal by the Court of Appeals Is Not Consistent With the Decision of This Court Which Determined That Where No Prosecution Is *In Esse* at the Time of a District Court Ruling on a Motion for Return of Property, Such Ruling Is a Final Appealable Order.

In 1961, this Court granted certiorari in *DiBella v. United States*, 365 U.S. 809 (1961), to resolve a then-existing conflict among the circuits on the question of the appealability of decisions rendered on pretrial Rule 41(e) motions to suppress and for return of seized materials. Thereafter, in *DiBella v. United States*, 369 U.S. 121 (1962), this Court established the guidelines for determining under what circumstances and as at what time a decision on a Rule 41(e) motion will be recognized as a "final decision" under 28 U.S.C. §1291. The rule announced by the Court provides that appealability will be recognized only if the motion is directed solely for return of property and that at the time of decision no prosecution is *in esse* against the movant. Justice Frankfurter stated:

> "*When at the time of ruling* there is outstanding a complaint, or a detention or release on bail following arrest, or an arraignment, information, or indictment—in each such case the order on a suppression motion

must be treated as 'but a step in the criminal case preliminary to the trial thereof.' Cogen v. United States, 278 U.S. 221, 227, 49 S.Ct. 120. *Only if the motion is solely for return of property and is in no way tied to a criminal prosecution in esse against the movant can the proceedings be regarded as independent.* Ibid.; see Carroll v. United States, 354 U.S. 394, 404 n. 17, 77 S.Ct. 1338; In re Brenner, 6 F. 2d 425 (C.A. 2d Cir. 1925)." *Id.* at 131-132 (Emphasis supplied).

Prior to its decision in the case at bar, the Court of Appeals for the Sixth Circuit had applied the *DiBella* rule to sustain appealability of decisions on pre-indictment motions, notwithstanding that the relief sought was not limited solely to the return of property. *Coury v. United States*, 426 F.2d 1354 (6th Cir. 1970), and *United States v. Williams*, 459 F.2d 909 (6th Cir. 1972). However, the court below departed from its recognition of the *DiBella* rule in this case upon its determination that the post-decision indictment of petitioner during the pendency of the appeal rendered the decisions non-appealable. *Sovereign News Co. v. United States*, 544 F.2d 909 (6th Cir. 1976). The court below ruled that the mere fact of the return of the indictment rendered the decision non-appealable, and expressly stated that, "We do not believe that it matters whether a prosecution is commenced before or after the notice of an appeal from an order determining a Rule 41(e) motion." *Id.*, at 911.

The court below found that its decision was consistent with the decision of the Court of Appeals for the Fourth Circuit in *Parrish v. United States*, 376 F.2d 601 (4th Cir. 1967), which, the court acknowledged, had "extended" the *DiBella* rule "to cases in which an indictment is not

returned until after a ruling on a pre-indictment motion is made and an appeal therefrom is noticed." *Sovereign News Co. v. United States*, 544 F.2d at 910. In *Parrish v. United States, supra*, however, the appellant's motion was dismissed by the District Court without a hearing and, at the time of the appeal, the appellant had been convicted in one of the cases in which he had been indicted and had been acquitted in another case in which an indictment was returned. In the case at bar, there was a full evidentiary hearing on the merits of the motion in the District Court and no proceedings other than arraignment were had in the District Court in connection with the post-decision indictment at the time the court below dismissed the appeals.

Moreover, in *Parrish v. United States, supra*, Judge Boreman concurred specially to observe that although dismissal of the appeal was proper because the motion sought suppression as well as return of property, he did not agree that post-decision events should be given consideration in determining appealability. *Id.*, at 603-604.

The court below also cited this Court's decision in *United States v. Ryan*, 402 U.S. 530 (1971), for the proposition that review of Rule 41(e) motion decisions will be allowed only if denial would result in the impossibility of any appeal whatsoever. However, this Court reiterated its rule of *DiBella* in its decision in *Ryan* without limitation or modification. *Id.*, 402 U.S. at 533.

In *DiBella*, this Court held that the critical time for determining whether a prosecution of the movant is *in esse* is "at the time of ruling [on the motion]" 369 U.S. at 131. At just what time a prosecution is *in esse* has been subject of judicial inquiry and is without consistent result. In *Shea v. Gabriel*, 520 F.2d 879 (1st Cir. 1975),

the court was unwilling to conclude that a pending investigation caused the motion proceeding to be related to a criminal proceeding *in esse*. In a *dictum*, after noting that "*in esse*" is defined as "In being. Actually existing. Distinguished from *in posse*, which means 'that which is not, but may be,'" 520 F.2d at 881, fn.7, the Court stated that *DiBella* requires that a complaint or indictment must exist at the time of ruling to render a decision on a motion for return non-appealable. *Id.*, 520 F.2d at 881-882.

The Fifth Circuit Court of Appeals has adopted the view that a prosecution is *in esse* at the time of issuance of a search warrant, which it has stated is a "critical step in a criminal prosecution." *United States v. Peachtree*, 456 F.2d 442, 448 (5th Cir. 1972). The Fifth Circuit has thus dismissed appeals from denials of motions to suppress or for return of property upon the theory that such motions serve to prevent the grand jury's consideration of the seized materials. *United States v. Peachtree, supra*, and *United States v. Glassman*, 533 F.2d 262 (5th Cir. 1976).[1] The Third Circuit Court of Appeals has also held that a prosecution is *in esse* where seized materials are to be presented to the grand jury. *Smith v. United States*, 377 F.2d 739 (3rd Cir. 1967). However, the court below has acknowledged that it has not adopted the view that a prosecution is *in esse* under such circumstance. *Sovereign News Co. v. United States, supra*, 544 F.2d at

1. It is for this reason that the Fifth Circuit Court of Appeals, when confronted with assertions that indictments have issued post-decision, has dismissed such contentions by stating that they are "irrelevant", *Dudley v. United States*, 427 F.2d 1140, 1141 (5th Cir. 1970), or while acknowledging that a literal reading of *DiBella* would compel a finding that a prosecution was not *in esse* "at the time this appeal was brought," *United States v. Glassman*, 533 F.2d 262, 263 (5th Cir. 1976), has proceeded to dismiss appeals upon determination that the grand jury's proposed use of the seized property constitutes a prosecution *in esse*.

911, fn.2.[2] Nor have the courts of appeals for the Eighth Circuit, *United States v. Alexander*, 428 F.2d 1169 (8th Cir. 1970), and the Tenth Circuit, *Gottone v. United States*, 345 F.2d 165 (10th Cir. 1965), *cert. den.*, 382 U.S. 901 1965), adopted such view.

Thus, although the Court of Appeals for the Sixth Circuit has held the line to that portion of this Court's decision in *DiBella* that a prosecution is deemed to be *in esse* when an indictment is returned and not prior thereto, the court has failed to adhere to this Court's remaining criteria for determination as to whether a Rule 41(e) motion is appealable—that is, that the prosecution be *in esse* at the time of the district court's ruling. Petitioner therefore believes that the grant of certiorari in this case is appropriate so that the Court may determine if the rule of *DiBella* will permit an appeal by a Rule 41(e) movant who stands unindicted at the time the motion is decided, but against whom an indictment is returned during the pendency of the appeal.

II. There Are Good and Sufficient Reasons for Allowing an Appeal From Denial of a Rule 41(e) Motion for Return Notwithstanding the Return of an Indictment During the Pendency of the Appeal.

Petitioner is cognizant of the principle of federal appellate jurisdiction which discourages piecemeal review, and which is particularly applicable in criminal cases. However, in the circumstance of the case at bar, there are compelling reasons to sustain a determination that the

2. It should be noted that petitioner's statement of jurisdiction in its opening brief to the Court of Appeals was not challenged by respondent in its answer brief to the court. Only after the indictment was returned did respondent move the court below to dismiss the appeals.

decisions should have been allowed review notwithstanding the return of the indictment.

First, this case presents an instance in which, at a time when jurisdiction was vested in the appellate court, events occurring after judgment in the district court were found to have effectively ousted the appellate court of its jurisdiction. While it is not denied that circumstances can occur after judgment which may affect the jurisdiction of an appellate court, for example, the case may become moot, this case is not within such category. Indeed, the general proposition governing appellate procedure is that:

> "After jurisdiction has been transferred, the lower court cannot proceed in any manner so as to affect the jurisdiction acquired by the appellate court, or defeat the right of appellant or plaintiff in error to prosecute his appeal or writ of error with effect." 4A C.J.S. 396-397, *Appeal & Error*, §607.

It was in light of the foregoing principle that Judge Boreman, concurring specially in *Parrish v. United States*, *supra*, stated:

> ". . . I do not agree that we should consider events which occurred subsequent to the decision below in considering and determining the appealability of the judgment of the district court.
>
> • • • • •
>
> "*It is the long established general rule* (with exceptions not pertinent here) *that appellate courts take questions raised on appeal as they existed below without considering subsequently occurring events*. . . If the plaintiffs had followed the suggested exception in *DiBella* as to an independent action solely for the return of property where no criminal proceeding was then

> afoot they conceivably could have sought the return of property through the use of a mandatory injunction. . . .
>
> • • • • •
>
> "*The indictments obtained and criminal proceedings prosecuted subsequent to the entry of the judgment of the district court are not in any way pertinent to the principal question here presented, i.e., the appealability of the judgment below.*" 376 F.2d at 603-604 (Emphasis supplied).

Second, if the appeal can be thwarted by a post-decision indictment, an unindicted movant whose motion for return has been denied is subjected to the risk that in the event he exercises his otherwise clear right of appeal he will be indicted. And thus, the unindicted movant is penalized two-fold: an indictment is very likely to issue during the course of the appeal as a result of his having taken a bona fide appeal, and not only the expense of pursuing the appeal is then for naught, but the would-be appellant may be confronted with the additional expense of defending a criminal case because he exercised his legitimate right of appeal.

Third, if the materials whose return is sought by the motion are crucial to the maintenance of any contemplated criminal prosecution, it is in the best interests of both the appellant and appellee that judicial review of the trial court's determination of the admissibility of such materials as evidence in the criminal prosecution be had in advance of the trial. Such pre-determination by an appellate court will not only be of assistance to the trial court in thereafter conducting the trial, but in the event the appellate court determines that all or part of the materials are not admissible, error is thereby immediately avoided. It may follow

that the indictment itself will be dismissed or, if the trial proceeds, that the evidence will not be introduced at trial. The result of such procedure inures to the benefit of both the parties and the courts. Not only has the initial trial been avoided or substantially reduced in time expended, but an appeal from a protracted trial with its attendant extensive record and additional assignment of errors has also been avoided. Finally, of course, the procedure here urged as appropriate will serve to avoid remand and, if necessary, a retrial of the case.

All of the foregoing, it is submitted, best serves the salutary purpose of promoting judicial economy at both the trial and appellate levels and, secondarily, the parties themselves are benefited by appellate review of the decision rendered on the motion for return, notwithstanding the fact that an indictment has issued during the course of the appeal.

CONCLUSION

This Court has observed that the question of finality and, therefore, appealability of orders issued on pre-indictment motions presents "a problem of considerable importance in the proper administration of criminal justice." *DiBella v. United States, supra,* 369 U.S. at 124. Although petitioner contended to the court below that this Court had resolved the issue in *DiBella* by setting out guidelines for determining under what circumstances such an order is appealable, the Sixth Circuit, as well as the Fourth Circuit, has *sua sponte* extended those guidelines to encompass a period of time and occurrences clearly beyond those delineated in *DiBella*.

The court below, by dismissal of the appeals, has sanctioned the defeat of its own jurisdiction after that jurisdiction had firmly attached, so as to deny petitioner its otherwise conceded right of appeal.

Finally, notwithstanding the post-decision indictment of petitioner, in the circumstances of this case, where a full evidentiary hearing was had in the district court, it is in the best interests of both the appellate and the district courts, as well as the parties themselves, that review of the motion decision be permitted.

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

BERNARD A. BERKMAN
LARRY S. GORDON
Counsel for Petitioner

April, 1977

APPENDIX

ORDER OF THE COURT OF APPEALS DENYING PETITION FOR REHEARING EN BANC

(Filed January 4, 1977)

No. 75-2431
No. 75-2432

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

SOVEREIGN NEWS COMPANY,
Plaintiff-Appellant,

VS

UNITED STATES OF AMERICA, et al.,
Defendants-Appellees.

ORDER

BEFORE: PHILLIPS, *Chief Judge*, PECK, and MCCREE, *Circuit Judges.*

The petition for rehearing with suggestion for en banc consideration having been filed with the court and no active judge having requested a vote on the suggestion for en banc consideration, and the petition therefore having been referred to the original panel, and it appearing that none of the contentions contained in the petition require reconsideration of the court's per curiam opinion, upon consideration, it is ORDERED that the petition be, and it hereby is, DENIED. The court further, *sua sponte*, strikes the words "without opinion" in the sixth line of

the first literary paragraph on page 1 of the slip opinion and strikes footnote one and changes the numbering of the other footnotes to conform.

Entered by order of the Court

/s/ JOHN D. HEHMAN
Clerk

OPINION OF THE COURT OF APPEALS

(Filed November 17, 1976)

Nos. 75-2431-32

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

SOVEREIGN NEWS COMPANY,
Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA,
Defendant-Appellee.

ON APPEAL from the United States District Court
for the Northern District of Ohio.

BEFORE: PHILLIPS, *Chief Judge*, PECK and MCCREE, *Circuit Judges.*

Per Curiam. These are appeals from the denial of two related motions, made pursuant to Rule 41(e) of the Federal Rules of Criminal Procedure, for the return of property seized pursuant to search warrants the validity

of which is challenged. These motions were denied by the district court without opinion[1] on October 19, 1975, and timely notices of appeal were filed. At the time the appeals were noticed, no indictment based upon the seizures had been returned. However, on March 25, 1976, an indictment based upon the seized materials was returned charging appellant and others with violation of 18 U.S.C. §§1461 and 2. Appellee then moved to dismiss the appeals on the ground that there was no longer an appealable final order because the indictment had been returned. This motion was improvidently denied.

An order denying a motion under Rule 41(e) is appealable only if it can be considered a final order because no related prosecution is pending. The Supreme Court held in *DiBella v. United States*, 369 U.S. 121 (1961), that "the mere circumstance of a pre-indictment motion does not transmute the ensuing evidentiary ruling into an independent proceeding begetting finality even for the purposes of appealability." 369 U.S. at 131. The Fourth Circuit in *Parrish v. United States*, 376 F.2d 601 (1967), extended this rule to cases in which an indictment is not returned until after a ruling on a pre-indictment motion is made and an appeal therefrom is noticed. We agree with this result,[2] which is consistent with the policy against piecemeal appeals.

---

1. The failure of the district court to state its reasons for denial gives us no basis to determine, *inter alia*, why the seizure of three copies of the allegedly obscene material was permitted, and whether the seizure has blocked the distribution or exhibition of the seized materials. *Cf. Art Theatre Guild v. Parrish*, 503 F.2d 133 (6th Cir. 1974).

2. Our decision in *United States v. Filing*, 410 F.2d 461 (6th Cir. 1969), does not support appellant's position because in that case the government had conceded that no further prosecution on the indictment was possible. Nor does our decision in *Coury*

(Footnote continued on following page)

We recognize that the Court in *DiBella, supra*, held that the denial of a motion solely for the return of property is appealable if it is in no way tied to a criminal prosecution *in esse*. Nevertheless, this proposition does not apply in this case because an indictment was returned before the appeal was calendared. We do not believe that it matters whether a prosecution is commenced before or after the notice of an appeal from an order determining a Rule 41(e) motion.[3] Review of such orders should be available only in cases in which a denial of review would render impossible any appeal whatsoever. See *United States v. Ryan*, 402 U.S. 530, 533 (1971). In this case, the imminent criminal prosecution will afford Sovereign News an opportunity to seek appellate review of the validity of the seizure.

The appeals are accordingly dismissed without prejudice to appellant's right to present again to this court the issues presented in them in the event of conviction.

(Continued from previous page)

v. United States, 426 F.2d 1354 (6th Cir. 1970), compel a different result here. In that case, appellant filed a motion to suppress the use of property seized as evidence against him, and to have it returned to him. We regarded the denial of the motion to suppress as not appealable because it was not a final order, but we held that the denial of the motion for the return of the property was final and appealable because no criminal charges had been filed.

3. Because an indictment was returned in this case, we do not have to consider at what point a criminal prosecution begins for the purpose of determining whether a Rule 41(e) motion is an independent suit. Some courts have held that for this purpose a prosecution may be deemed as having begun even before an indictment has been returned. See *United States v. Peachtree National Distributors*, 456 F.2d 442 (5th Cir. 1972); *Smith v. United States*, 377 F.2d 739 (3d Cir. 1967). This court and other courts have not so held. See *Coury v. United States*, 426 F.2d 1354 (6th Cir. 1970), approved, *United States v. Williams*, 459 F.2d 909 (1972); *United States v. Alexander*, 428 F.2d 1169 (8th Cir. 1970); *Gottone v. United States*, 345 F.2d 165 (10th Cir. 1965). See also *Shea v. Gabriel*, 520 F.2d 879 (1st Cir. 1975).

ORDER OF THE COURT OF APPEALS DENYING MOTION TO DISMISS APPEAL

(Filed July 15, 1976)

Nos. 75-2431, 75-2432

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

SOVEREIGN NEWS COMPANY,
Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA,
Defendant-Appellee.

ORDER

Before: CELEBREZZE, PECK and MCCREE, *Circuit Judges.*

Upon due consideration, Defendant-Appellee's Motion to Dismiss the appeal be and it is hereby denied.

ENTERED BY ORDER OF THE COURT

/s/ JOHN P. HEHMAN
Clerk

ORDER OF THE DISTRICT COURT

(Filed October 15, 1975)

UNITED STATES DISTRICT COURT

Civil Action
Number C75-620

NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

SOVEREIGN NEWS CO.,
Plaintiff,

vs.

UNITED STATES OF AMERICA,
Defendant.

ORDER

This matter having been consolidated for hearing with C75-621, and the court having rendered its oral opinions in open court in favor of the defendant, therefore, pursuant to Rule 58, Federal Rules of Civil Procedure;

IT IS ORDERED that the motion of the plaintiff for return of all seized property is hereby denied. However the court on October 14, 1975 ordered the return of certain seized items, as identified in open court, to which orders the government acceded.

IT IS FURTHER ORDERED that the complaint is hereby dismissed, with prejudice, at plaintiff's costs.

/s/ WILLIAM K. THOMAS
U.S.D.C. Judge

ORDER OF THE DISTRICT COURT

(Filed October 15, 1975)

UNITED STATES DISTRICT COURT

Civil Action Number C75-621

NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

SOVEREIGN NEWS CO.,
Plaintiff,

vs.

UNITED STATES OF AMERICA,
Defendant.

ORDER

This matter having been consolidated for hearing with C75-620, and the court having rendered its oral opinions in open court in favor of the defendant, therefore, pursuant to Rule 58, Federal Rules of Civil Procedure;

IT IS ORDERED that the motion of the plaintiff for return of all seized property is hereby denied. However the court on October 14, 1975 ordered the return of certain seized items, as identified in open court, to which orders the government acceded.

IT IS FURTHER ORDERED that the complaint is hereby dismissed, with prejudice, at plaintiff's costs.

/s/ WILLIAM K. THOMAS
U.S.D.C. Judge

No. 76-1345

In the Supreme Court of the United States

OCTOBER TERM, 1977

SOVEREIGN NEWS COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

DANIEL M. FRIEDMAN,
Acting Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-1345

SOVEREIGN NEWS COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that the court of appeals erred in dismissing his appeal from district court orders denying its motions for return of seized property pursuant to Rule 41(e), Fed. R. Crim. P., on the ground that an indictment was returned against petitioner when the appeal was pending.

1. On July 17, 1975, petitioner filed two motions in the United States District Court for the Northern District of Ohio seeking return of property which had

been seized on March 19 and March 26, 1975, in execution of two search warrants issued by a magistrate. After an evidentiary hearing, the district court denied the motions on October 15, 1975 (Pet. App. 20-21).[1] Petitioner filed a notice of appeal the next day. On March 25, 1976, after briefs were filed but prior to oral argument, the grand jury—whose investigation was going on during the pendency of petitioner's motions (Tr. 304)—returned an indictment against petitioner (Pet. 5; Pet. App. 17).[2]

The government then moved to dismiss the appeal. The court of appeals initially denied the motion (Pet. App. 19) but subsequently concluded that its denial was improvident and dismissed the appeal as interlocutory (Pet. App. 16-18; 544 F. 2d 909).

2. The court of appeals correctly dismissed the appeal as interlocutory. In *DiBella* v. *United States*, 369 U.S. 121, 132, this Court held that the denial of a motion for the return of seized property constitutes an appealable "final decision" under 28 U.S.C. 1291 only if the motion is "in no way tied to a criminal prosecution *in esse* against the movant." In that case the Court held that a denial of a motion for return of property, issued several days after an indictment was returned, was not appealable.

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[1] The court did order the return of certain of the seized items (*ibid.*).

[2] The indictment charges petitioner with importation, interstate transportation, and mail delivery of obscene materials, in violation of 18 U.S.C. 1461, 1462 and 1465.

Although *DiBella* itself involved an order issued after an indictment was returned, the principles of that decision apply equally to foreclose appeal when, as here, an indictment is returned after issuance of the order denying the motion but before the appeal is decided. First, the Court in *DiBella* indicated a number of circumstances, in addition to an indictment, which establish the existence of a criminal prosecution for purposes of determining whether a denial of a motion for the return of property is appealable. As the Court stated (369 U.S. at 131; citations omitted):

> Presentations before a United States Commissioner * * * as well as before a grand jury * * * are parts of the federal prosecutorial system leading to a criminal trial. Orders granting or denying suppression in the wake of such proceedings are truly interlocutory, for the criminal trial is then fairly in train.

Here the district court denied petitioner's motions when a grand jury investigation was pending and thus, when the criminal prosecution was "fairly in train." See also *United States* v. *Glassman*, 533 F. 2d 262 (C.A. 5); *United States* v. *Peachtree, National Distributors*, 456 F. 2d 442 (C.A. 5); *Smith* v. *United States*, 377 F. 2d 739 (C.A. 3).[3]

---

[3] As the court below noted (Pet. App. 18, n. 3), some courts have indicated that for purposes of appealing denials of Rule 41(e) motions, a criminal prosecution does not commence until the indictment is returned. See, *e.g.*, *United States* v. *Alexander*, 428 F. 2d 1169 (C.A. 8) and *Gottone* v. *United States*, 345 F. 2d 165 (C.A. 10), certiorari denied,

Second, the principles underlying the decision in *DiBella* apply fully when an indictment is returned when the appeal is pending but before the appellate decision has been rendered. In *DiBella* the Court emphasized (369 U.S. at 126) that

> the delays and disruptions attendant upon intermediate appeal are especially inimical to the effective and fair administration of the criminal law.

The mere fact that a notice of appeal from a Rule 41(e) ruling has been filed before an indictment is returned does not lessen the delay and disruption in the criminal proceeding that would result from permitting the appeal to go forward. In some cases it may be many months after the return of the indictment before an appellate decision is rendered—all to the sacrifice of the defendant's and the public's interest in speedy criminal trials. Furthermore, once an indictment is returned, the defendant's right to appellate review of the Rule 41(e) ruling is ensured and there is no need for an interlocutory appeal.[4]

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382 U.S. 901, on which petitioner relies (Pet. 9). In those cases, however, no indictment was returned before the decision on appeal and there was no indication that grand jury proceedings were pending when the district court ruled on the motions.

[4] Petitioner's argument (Pet. 11) that an interlocutory appellate decision on important evidentiary questions will promote judicial efficiency would apply to both pre- and post-indictment suppression motions, and that argument has been consistently rejected by the courts on the basis of the greater interest in securing speedy trials and avoiding the disruptions resulting from piecemeal review.

Petitioner's further contention (Pet. 11) that dismissal of appeals in these circumstances will prompt prosecutors to seek indictments in order to foreclose appeals from Rule 41(e) rulings is groundless. Prosecutors and grand juries are not likely to bring indictments merely for the purpose of retaining seized evidence, and in any event defendants cannot ultimately be deprived of their appellate remedy.

For the foregoing reasons, the petition for a writ of certiorari should be denied.

DANIEL M. FRIEDMAN,
*Acting Solicitor General.**

JULY 1977.

* The Solicitor General is disqualified in this case.

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